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Tiny Transaction Is Big Focus Of Prosecutors in Enron Case

Sale of Barges to Merrill Leads To the Most Indictments Of Any Part of Vast Probe

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Staff Reporters of THE WALL STREET JOURNAL

EXECUTIVES ON TRIAL

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A tiny deal that initially was buried in the rubble of Enron Corp.'s collapse has turned into an important building block in the government's effort to prosecute executives at the failed energy giant.

The deal hinged on the sale of an interest in three barges, which were to produce electricity for the government of Nigeria, and generated only \$12 million in profit for Enron. But it has led to indictments of eight people, more than any other Enron deal, and offers a telling glimpse into how the government investigation is evolving.

Investigators learned about the barge transaction almost immediately after they started looking at Enron's problems in late 2001. To investigators, the deal looked suspicious, in part because it was executed so quickly. But it was just one of "a host of transactions that could start unraveling," if probed hard enough, says a person familiar with the early investigation. The deal contributed about 1% to Enron's reported 1999 net income of \$893 million. There were plenty of other similarly curious transactions for investigators to examine, some of which involved hundreds of millions of dollars and potentially offered more direct links to top Enron executives.

But as Justice Department lawyers slogged through the maze of Enron transactions, the barge deal started looking increasingly attractive. For one thing, some of the bigger deals were extremely complex, making them hard to explain to a jury. Also the accounting treatment for many of them had been blessed by Enron's outside auditor, Arthur Andersen LLP. Such approval makes it much harder to prosecute an executive for knowingly committing criminal acts, since the executive can argue that he or she relied in good faith on outside experts.



Andrew Fastow

In the case of the barge deal, some of the evidence suggested that a crucial aspect of the transaction had been hidden from the outside auditors. It was comparatively simple and explicitly documented in internal e-mails and documents. Though small, the deal's resulting earnings had helped Enron meet its profit target for 1999 and the company had rushed to get the deal done by Dec. 31. The involvement of **Merrill Lynch & Co.**, as the buyer of the interest in the barges, was another draw for prosecutors, particularly because the nation's biggest brokerage firm had done the deal mostly as a favor for a valued corporate client, according to congressional testimony by a Merrill official.

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The focus on the Nigerian barges comes as a special task force of about half a dozen U.S. Justice Department attorneys and a platoon of FBI agents pick their way through the Enron fiasco. When the energy giant collapsed in late 2001, it left behind a labyrinth of alleged financial fraud and self-dealing involving private partnerships run and partly owned by Enron insiders.

As prosecutors sift through Enron's various deals, they have so far charged about two dozen individuals with crimes ranging from fraud and conspiracy to money laundering and insider trading. While most of those charged have pleaded not guilty and await trial, a handful have reached plea agreements with the government and are cooperating. Only one former Enron executive, Treasurer Ben Glisan Jr., is in prison. Former Chief Financial Officer Andrew Fastow has been indicted for fraud and other charges, including two counts related to the barge sale. He pleaded not guilty and is scheduled to go to trial in April.

A big unanswered question is whether prosecutors will bring charges against Enron's two former chief executive officers, Kenneth Lay and Jeffrey Skilling. The two men have denied any wrongdoing, and neither appears to be implicated in the barge case. Mr. Lay last week agreed to turn over documents to the Securities and Exchange Commission, after refusing to do so for more than a year.



Jeffrey Skilling

In the past year, prosecutors have charged four Enron executives and four Merrill Lynch executives on conspiracy to commit wire fraud and falsifying books and records in connection with the Nigerian barge deal. Among them were Mr. Fastow and Daniel Bayly, Merrill's former head of global investment banking.

But it was the indictment of two lower-level executives that sent tremors through the ranks of the two companies. One of them was Daniel Boyle, formerly one of Enron's 650 vice presidents. By all accounts, Mr. Boyle didn't help put together the Nigerian deal. But he was one of several people who listened in on a brief conference call that the government considers key to proving that the barge transaction was fraudulent. The other executive was James Brown, a Merrill finance specialist who had actually warned Merrill executives against doing the barge deal, arguing that it might help Enron

manipulate its earnings. He was overruled and told to help with the transaction, according to a report by Neal Batson, the court-appointed examiner in Enron's bankruptcy case.

To employees at Enron and Merrill, the indictments were a disturbing sign that prosecutors were willing to dive into an obscure deal and come up with lesser figures to indict. Mr. Boyle's indictment "was a scary day for lots of us," says one former Enron middle manager. The 47-year-old Mr. Boyle was known inside Enron as someone who worried about the company's aggressive, deal-making culture, according to former colleagues.

Some executives worried that they had incriminated themselves by helping investigators. Mr. Brown initially was viewed by investigators and others as something of a whistleblower because he had opposed the barge deal in its early stages. But his cooperation backfired. Besides being indicted for his role in the transaction, he was charged with perjury; Merrill attorneys found an e-mail he had sent that helped convince prosecutors that he had lied to authorities.

William Rosch III, Mr. Boyle's attorney, says his client denies any wrongdoing and will fight the charges in court. Larry Zweifach, Mr. Brown's attorney, says his client "is innocent of the charges that have been brought against him, and has every intention of taking this case to trial." The other barge-deal defendants also have pleaded not guilty.

Some defense attorneys familiar with the Enron investigation privately argue that the indictments of midlevel officials are a sign that prosecutors are frustrated because they have had trouble bringing charges against very senior Enron executives, particularly Mr. Lay and Mr. Skilling.

But late last month prosecutors had a breakthrough of sorts when they announced a plea deal with David W. Delainey, former head of Enron's North American unit. Mr. Delainey, who agreed to cooperate with prosecutors, dealt with Mr. Skilling, Mr. Lay and other senior executives.



Daniel Boyle

Other lawyers familiar with the investigation say that prosecutors believe that indictments against lower-level officials could help persuade people with knowledge of criminal activity to cooperate. In a high-stakes investigation such as the Enron probe, someone who had contact with criminal activity is "either going to be a witness or a defendant," says one person familiar with the case.

This so-called pyramid approach of working from lower to higher level participants has been used in past cases by the two lead Enron prosecutors, Leslie Caldwell and Andrew Weissmann, says Mark Ressler, a former federal prosecutor who worked with the pair.

The case revolves around whether Enron's barge transaction constituted a real sale. Prosecutors allege that Mr. Fastow promised Mr. Bayly that Enron would buy Merrill out of the transaction within six months and that it would earn a guaranteed premium on its \$7 million equity investment. Such a guarantee -- which allegedly came during the late December 1999 conference call that Mr. Boyle listened to -- would have meant that Merrill's money was never truly at risk. In that case no legitimate sale would have occurred and Enron couldn't have legally reported a profit from it.

In addition to the paper trail, prosecutors have the testimony of former Fastow lieutenant Michael Kopper, who has been cooperating with investigators as part of his plea to two felony counts. Mr. Kopper said that "Fastow told him that he had an undisclosed oral agreement" with Merrill on the deal, according to the Justice Department's initial criminal complaint against Mr. Fastow in October 2002.

The barge transaction provides possible links to other former senior Enron officials. Jeffrey McMahon, then Enron's treasurer, took part in the 1999 discussions with Merrill, according to deal-related documents and people familiar with the barge sale. Mr. McMahon, who was promoted to Enron president before leaving the company last year, has in the past declined to comment. He and his attorney didn't return phone calls. Last year, while Mr. McMahon was still at Enron, a company spokesman said the executive's participation in the barge transaction was "entirely legitimate."

Another senior figure of interest to investigators is Former Chief Accounting Officer Richard Causey. In the initial criminal complaint against Mr. Fastow last year, the government alleged that Mr. Causey, who was identified by his title, had been involved in making "false representations" to Enron's board concerning some of the insider-run partnerships. On at least one occasion, midlevel Enron officials involved with the barge deal raised concerns that reached Mr. Causey, who said he knew of nothing improper about the transaction, say two people familiar with the matter. An attorney for Mr. Causey, who hasn't been charged with any crime, didn't return phone calls but in the past has said that his client did nothing illegal at Enron.

The prosecutors' strategy means that they are focusing in part on small fry, including Mr. Boyle. He has said that he met Mr. Fastow only once, for a few minutes, while delivering documents to the chief financial officer's home, according to a person familiar with the case. Mr. Boyle has told people that he got the barge assignment only because another Enron manager wasn't available, and that his role on the deal was so insignificant that he wasn't even invited to the deal-closing celebration.

A former bank official, Mr. Boyle was a newcomer to Enron, having joined the company in 1998. Known within Enron for being cautious, he once objected to a proposed deal in Indonesia because it carried too many risks, says a former Enron colleague. Closing that deal could have resulted in a bonus for Mr. Boyle. "Dan expressed concerns about pushing the envelope because of the pressure that was on to get deals closed in such a quick fashion," says another former colleague. "Dan was not a decision maker. He was an implementer," he adds.

Mr. Boyle allegedly did help implement the barge deal. His name appears on documents that investigators consider important. And he was one of the listeners on the conference call involving Messrs. Fastow and Bayly. Mr. Boyle has told people he believes Enron made a commitment to get Merrill out of the barge deal within six months, according to a person familiar with the case. But he said he didn't believe that commitment broke any laws nor did he know of any profit guarantee.



James Brown

About six months after Merrill's purchase, Mr. Boyle helped arrange for the Wall Street firm to sell its interest at a profit to LJM2, a partnership run by Mr. Fastow, according to the barge indictment. Prosecutors allege that this second transaction was part of the scam.

Since the indictment, Mr. Boyle and his wife, who have four adopted children, have sold their home and moved to a smaller one. Friends and family have started a defense fund to defray the family's legal and living expenses. "For Dan to be guilty, he would have to be a completely different person than the one I know," says Randy Mulvaney, a friend of Mr. Boyle's from Clear Lake Church of Christ, where they worship.

At Merrill Lynch, Enron was considered to be a valuable client, producing tens of millions of dollars a year in investment-banking fees. But Mr. Brown, 51, had a lower opinion of the energy-trading company, says a person close to Mr. Brown. In preparation for a Dec. 22, 1999, meeting of Merrill officials about the barge deal, Mr. Brown scribbled out a list of 10 reasons why Merrill should not do the transaction.

At the meeting, however, other Merrill officials argued forcefully in favor of the deal, according to the bankruptcy examiner's report. Merrill officials decided to ask Mr. Bayly to call Mr. Fastow for assurances that the firm would be able to exit the barge deal within six months, according to the bankruptcy report. Mr. Bayly's attorney, Richard Schaeffer, says that a senior Merrill executive asked him to make the phone call to Mr. Fastow.

Mr. Brown told federal investigators last year that he believed that Enron had only pledged to make its best effort to quickly find a buyer for Merrill's interest. But this spring Merrill attorneys discovered an e-mail that Mr. Brown had written in March 2001 describing a more ironclad understanding between Enron and Merrill and turned it over to the government. In discussing the need to get verbal assurances on an unrelated deal, Mr. Brown wrote: "We had a similar precedent with Enron last year, and we had Fastow get on the phone with Bayly and lawyers and promise to pay us back no matter what."

When the Enron bankruptcy examiner asked Mr. Brown about the e-mail this April, he asserted that he had exaggerated the extent of Enron's verbal assurances in the e-mail and that there wasn't a guarantee. But prosecutors decided he was lying. Because of the perjury charge for allegedly lying to investigators about the verbal guarantee and a third charge for obstruction of justice, Mr. Brown possibly faces more prison time than his three Merrill co-defendants.

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